SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

No. 9 ORIGINAL.

SOUTH DAKOTA,

vs.

NORTH CAROLINA,
CHARLES SALTER,
SIMON ROTHSCHILDS,

Brief for Second Mortgage Bondholders.

I.

RIGHT OF SECOND MORTGAGEES TO REDEEM.

It appears that the defendant State at the time of making the mortgage was the owner of 30,000 shares of stock of the par value of $3,000,000, and that the mortgage was of such an *amount of stock* as should *equal at par the par of bonds* to be issued in aid of the Western North Carolina Railroad. It also appears that at the time of this mortgage the State's 30,000 shares was subject to a first mortgage to secure 6 per cent. thirty year bonds for $3,000,000, which are known as "first mortgage bonds," so that the bond issue, some of which is owned by the plaintiff State, is secured by a *second* mortgage upon the stock.

The first mortgage bonds matured in 1879, *some years subsequent* to the issue of the second mortgage bonds, and, of course, the second mortgage bond holders had a right to redeem the first mortgage.

Under those circumstances, the defendant State, in 1879,

passed an act to renew the first mortgage bonds by the issuance of a forty year bond at 6 per cent., to stand in the place of the original first mortgage bonds; it being provided that the new bonds were not an extinguishment of the old bonds, but a *renewal* and *extension* of the same, and without prejudice to the old bonds. It further appears that, nevertheless, the old bonds were surrendered by their holders and delivered up to the State, and were destroyed and cancelled; so that the forty year bonds were in fact new bonds; so that there was a surrender and cancellation of the whole issue of the old bonds by their holders and an acceptance by them of new bonds for a different amount, as more fully appears by Exhibit C, attached to the bill. (Rec. 12 et seq.)

The holders of the second mortgage bonds were not *parties to* and did *not consent* to the alleged extension of the first mortgage bonds; and so, if the first mortgage bonds were not actually extinguished, but were, as is claimed by the holders and by the defendant State, simply *extended* as respects the time of their maturity, then the extension as respects the holders of the second mortgage bonds was ineffective The maturity of the first mortgage could not be postponed without the consent of the second mortgagees, who possessed a vested right to pay off and discharge the first mortgage, according to its terms concerning maturity. But if the first mortgage bonds were not extended, but were actually extinguished, then the seond mortgage, held by the plaintiff State and the other holders of the same issue of bonds, is a first mortgage.

Mr. Justice Campbell, of Michigan, said: "That a second mortgagee has an absolute right, at any time after the coming due of a prior incumbrance, to redeem it and be subrogated to it; and further said that the right of a second mortgagee to redeem a prior mortgage cannot be *cut off or prejudiced by arrangements between the holder* of the first mortgage and the mortgagor for an *extension* of time to pay it.

Sager vs. Tupper, 35 Mich., 134.

In Iowa, it was said: "That the right of a second mortgagee to redeem, after the maturity of the prior mortgage,

is not affected by the fact that the time of the payment of the debt secured by the first mortgage had been extended, if the junior mortgagee had no notice of the extension (before taking his mortgage).

Wheeler vs Menold, 81 Ia., 647.

II.

PARTIES.

In any aspect of the case, the first and second mortgage bondholders, upon the general principles of equity, being interested in the funds, must be made parties to the suit.

The rule in equity upon the subject is that all persons who have an interest in a suit must be made parties; and it is also a familiar rule that when it is impracticable to bring before the Court all interested, it is sufficient to make such persons parties as have a common interest with those who are absent. In such a case the parties who are present in the suit represent the rights of those who are absent, and the Court proceeds to make its decree binding the rights of the absent parties.

Story Eq. Pl., 97, 112.

Florida vs Georgia, 17 How., 510.

The language of the latter case is by Mr. Justice Curtis, in a dissenting opinion, but not dissenting upon this point.

Under this rule the first mortgage bondholders are represented as a class by the defendant Simon Rothschild, a citizen of New York, and the second mortgage bondholders, holding bonds of the same issue as those sued on are represented by the defendant Charles Salter, also a citizen of the State of New York.

In such cases, equities adjudged against parties served with process are binding upon all persons *of the same class*, although absent from the litigation, because of the *vicarious*

representation in the present litigants of the same class to which they belong.

Morton v. New Orleans R. R., 75 Ala, 590, 611.

See also—

Knickerbocker Trust Co. v. Penacook Mfg. Co., 100 Fed., 814.

Dickerman v. Nor. Trust Co., 80 Fed., 450.

Clearly there is jurisdiction between the plaintiff State and two citizens of another State, viz.: the State of New York; just as there is jurisdiction between the plaintiff State and the defendant State of North Carolina; and no objection is perceived to joining the defendant State with two citizens of another State as defendants.

In Missouri vs. Illinois, 180 U. S., 208, a citizen of the defendant State, a corporation by the name of the Sanitary District of Chicago, was joined as a defendant with the State of Illinois.

In South Carolina vs. Georgia, 93 U. S., 4, individuals were joined with the defendant State, and the jurisdiction sustained.

So also Louisiana vs. Texas, 176 U. S., 1.

This bill necessarily makas the senior mortgagees parties, as it seeks a sale of the stock free from incumbrances; and it is *in effect a bill to foreclose the second mortgage and to redeem the first mortgage.*

The plaintiff State, bringing *all* persons in interest before the Court, and both mortgages being *overdue*, and all bondholders being *proportionally* interested, seeks a sale of the mortgaged property. This, under the rules of equity, it is *required* to do for the purpose of collecting its own debt.

While a bill to foreclose a second mortgage does not require to have a first mortgagee made defendant, yet, when the decree sought is subject to the mortgage of the first mortgagee, and his mortgage is due, he may be made a party; and if, as in the present case, the property should be ordered to be sold free of incumbrances, the first mortgagee *must* be made a party, and the bill in such a case is, in *effect*, *both a bill* to

foreclose the *second mortgage* and a bill to *redeem* the first mortgage.

GRAY, J., in Heffner v. N. W. Life Ins. Co., 123 U. S, 747, 754 *top*, and cases cited.

See also—

Jerome v. McCarter, 94 U. S., 734.

Sutherland v. L. S Co., 1 Cent. L. Jour., 127.

McClure v. Adams, 76 Fed., 899.

Nothing in equity principles requires this complainant State to invite the other holders of this issue of bonds to join in the suit. Courts of equity do not require a mortgagee holder of a fraction of a mortgage debt to call upon his associate mortgagees to unite with him in a suit for foreclosure. He may make them defendants.

2nd. Jones on Mortgages, Sec. 1369, from which we quote: "It is not very material, however, in an equity suit, whether more than one of the persons interested in prosecuting it is nominally made plaintiff It is generally sufficient that the person to be bound by the decree shall be brought before the Court in some capacity. (Wilkins vs Frye, 1st Mer. 244-262, per Sir Wm. Grant, "In equity it is sufficient that all parties interested in the subject of the suit should be before the Court, either in the shape of plaintiffs or defendants.") When a person having an interest in the security is made a defendant in the action, the Bill ought to show his refusal to join as a plaintiff; but this admission is not material unless such defendant objects by demurrer. (Hancock vs. Hancock, 22 N. Y. 568, and Carpenter vs. O'Dougherty, 58 N. Y. 681.) If several persons have right and interest in the same demand and security, even if these are not strictly joint, and are entitled to the same relief, they should naturally join as plaintiffs in seeking it. But if one of the persons so interested institutes the suit, and makes the others having like interest defendants, the requirements of equity are generally satisfied. If several persons have claims alike in being antagonistic to the defendant, but several and distinct in their nature, because they have arisen out of different events and circum-

stances, although they may join as co-plaintiffs in seeking the same relief, in actual practice one person, perhaps by reason of his greater interest or more urgent occasion for relief, institutes a suit without asking the co-operation of the others, making them defendants. And finally, as no one can be made a plaintiff against his will, this practical restriction in many cases determines the question whether a person shall be made plaintiff or defendant."

See also Rankin vs. Major, 9th Iowa, 297; Thayer vs. Campbell, 9th Mo., 280.

But according to the doctrine settled by this Court in Stuart vs. Dunham, 115 U. S., 64, the individual second mortgage bond holders could have become co-complainants without violating the 11th Amendment, and the jurisdiction would not have been lost. Says the 11th Amendment: "Individuals shall not sue a State in the Federal forum." Says the Constitution when it limits Federal jurisdiction to controversies between citizens of different States: "A citizen of a State shall not sue a citizen of the same State in the Federal forum unless jurisdiction attaches by reason of the nature of the action." The case was originally constituted between citizens of different States The jurisdiction depended upon diverse citizenship, and that alone. The original plaintiff sued for himself and all other creditors of the defendant who should join as plaintiffs. After the case was constituted and removed to Federal Court certain creditors, citizens of the same State with some of the defendants, came in and were permitted to join as plaintiffs, and the *original bill amended accordingly*. This Court held that the jurisdiction was not lost.

III.

SECOND MORTGAGE IS *IN SOLIDO* AND NOT A SEPARATE AND INDEPENDENT MORTGAGE OF TEN SHARES FOR EACH BOND.

It appears from the bill and exhibits B thereto that the defendant State made a mortgage to secure the bonds sued on

and the whole issue, in the following language: "The public treasurer is hereby authorized and directed, whenever it shall become his duty under the provision of said acts to *issue bonds* of the State,.... to mortgage an *equal amount* of stock which the State now holds in the North Carolina Railroad as collateral security for the *payment of said bonds*, and to execute and deliver with each several bond a deed of mortgage for an equal amount of stock of said North Carolina Railroad, said mortgage to be signed by the treasurer and countersigned by the comptroller, to constitute a part of said bond, and to be transferable in like manner with it, as provided in the charter of said Western North Carolina Railroad Company; and further, that such mortgage shall have all the force and effect, in law and equity, of actual mortgages without actual registry."

The defendant State was owner of 30,000 shares of stock in the North Carolina Railroad Company, of the par value of $3,000,000; shares $100 par.

It will be observed that the treasurer was directed to mortgage an amount of *stock equal to the bond issue*, and that a *proportional* amount of stock was to be made collateral security for the payment of each bond; that is to say, a number of shares of $100 each was to be collateral to each bond, and a number of shares at that figure was to make a sum equal to the par bond, and upon the bond there was endorsed a statement to that effect.

We contend that this mortgage, in equity, stands as security *for all* the bonds, and that the bonds, being sold to different persons, the mortgage still stands for all the bonds, *pro rata*.

Such is the general rule with regard to mortgages securing a large number of bonds, and there is nothing in the language of the act of the defendant State showing an intention to *vary the general* rule on the subject. Vast numbers of bonds secured by mortgage have been in use in this country, and nothing is discovered in the terms of the North Carolina act to indicate any purpose to *vary the general rule*. *No specific shares* of stock are attached to any particular bond. The lan-

guage "ten shares of the stock" plainly indicates *simply that proportion* out of the whole number of shares of stock mortgage. The shares of stock mortgaged were an *amount equal to the number of bonds* issued. That is the contract in substance; the actual words are "when the treasurer shall issue bonds of the State to the amount of $50,000 or more, he shall mortgage *an equal amount of stock, as collateral security for the payment of said bonds*" Plainly, the *whole amount* of shares of stock becomes security for the whole *amount* of the bonds.

The general rule in equity is stated in 3rd Am. Ed. 1859, Phila., White and Tudor's Leading Cases in Equity, Wallace's notes to the cases of Row vs Dawson and Ryall vs Rowles.

It is there stated, on p. 646, that where there are different obligations secured by the same mortgage, the mortgage creates a *trust for the payment of all* the obligations under which each bond holder has equal claims, and that the question is one of *contract* or intention, p. 647.

On p. 369 same vol., is stated the general doctrine given above, that the mortgage is simply security for debt, and that whatever transfers the debt carries with it the mortgage.

The Supreme Court of Michigan say, in

English vs. Carney, 25 Mich., 178, 181 (bottom), that it is settled, in accordance with the weight of authority, that a mortgage given to *secure several* obligations stands as *security for the whole*, and that, if a mortgagee assigns one of the obligations to a third person, the mortgage in equity would stand as security for all the obligations, as well to the one assigned as those retained.

It is further said, at the top of p. 182, that when all bonds are sold and transferred, each to a different person, the mortgage will stand as an *equal security* for all the obligations, *pro rata*.

The United States Circuit Court of Appeals, 6th Circuit; in Kortlander vs. Elston, 52 Fed. R., 180 and 183 (bottom), recognizes the doctrine laid down in the case of English vs. Carney, and says that in that case it was held on foreclosure

that the proceeds of sale must be applied *pro rata* to all the notes, because a pro rata application of security to all the notes was fixed by the original *contract* of the mortgage.

It may further be said that the certificate upon the bond, with regard to security for 10 shares, being no *part of the statute* cannot *affect* the *construction* of the statute; and, as to the construction of the statute, the rule is that what is implied in it is as much a part of it as what is expressed. That is, the intention of the maker of the statute being as much within the statute as it is within the letter the Court has to ascertain the meaning, which was to mortgage all the stock to secure all the bonds, each proportionally.

U. S. v. Babbitt, 1 Black (U. S.) 61.

County of Watson vs. Natl. Bank, 103 U. S., 770.

This second mortgage is not a series of several hundred or several thousand independent mortgages. It is not a separate and several mortgage for each bond, but it is a mortgage in solido upon all the shares included in the mortgage. That is, upon so many shares as being added together should equal in their par the amount of the bonds to be issued. The intention was, as is always the case in mortgages to secure bonds, that each bond holder should stand upon an equal footing with every other bond holder.

The State Treasurer and Comptroller when they executed the "Deed of Mortgage" used the expression, "ten shares are hereby mortgaged to secure this bond." But this expression was only to notify the holder that he and his associate bond holders had a mortgage on an amount of the stock equal to the amount of the bonds. It was never intended that one bond holder should get an advantage over his associate bond holder by obtaining ten shares and acquiring the exclusive title thereto. He was not entitled to any particular ten shares. But he and his associates were entitled jointly to all the shares that were mortgaged. The mortgagor State and the mortgagee bond holders settled this point by their own action. The mortgagor State had 30,000 shares ($3,000,000 par.) Of this 10,000 shares ($1,000,000 par) was preferred

stock. (Record 149 bottom.) The other 20,000 shares ($2,000,000 par) was unpreferred stock. When the mortgagor State executed its "Deed of Mortgage," the method and manner of the deed being directed and fixed by the Act of 1866 which created the Second Mortgage, it included in the mortgage only the unpreferred stock; that is, the two millions of stock authorized by the Act of 1849, which was "*originally subscribed*" by the State. The endorsement or mortgage (Record 10 bottom) calls for stock "*originally subscribed.*" The $2,000,000 subscribed by the Act of 1849 was the "original subscription." The second subscription was by the Act of 1855 and was preferred stock. So the mortgage was and is only on the two million of unpreferred stock. But the State issued more than two million of bonds (Answer of North Carolina, Art. II., Record 15.) It issued $2,463,000. So there were not shares enough to "go around" There was not enough stock to give ten shares for each one thousand dollar bond. Who will deny that while these issues were outstanding the mortgagee bond holders would have been compelled in equity to *pro rate* on a foreclosure? This action of the mortgagor and mortgagees fixes the fact that they intended the mortgage to be in solido. True it is that *now* the amount of outstanding bonds is less than the amount of the unpreferred stock, but if the mortgage was in solido when executed it is so now.

The mortgage being for the benefit of all the bond holders, each bond holder has an undivided and undivisable interest in each and every share of stock. This defendant, Salter, and his associate holders of Second Mortgage bonds have an interest, a vested right, as much in the one hundred shares belonging to Complainant as in any other shares,—indeed as much as he has in the ten shares called for by his own individual bonds. This Court cannot set apart one hundred shares for Complainant save by wrongfully depriving this defendant and his associates of their property in such one hundred shares.

We submit that the rights of Complainant can only be administered by the sale of the mortgaged stock and the distribution of the proceeds pro rata among all the mortgagees.

The benefit derived by individuals is merely incidental in the course of this suit wherein the Court is bound by the Constitution to give relief to the Complainant. This constitutional jurisdiction ought not to be defeated because in the enforcement of it individuals may obtain benefits. They are in no sense plaintiffs. They are not seeking nor are they entitled to a judgment against the defendant State. They are simply interested in the *res*. It plainly appears that the security is not sufficient to pay the Second Mortgage bonds in full. Suppose the outstanding Second Mortgage bonds are $250,000 par. Their coupons amount to, say, $450,000. The stock ($250,000) being sold, say, at $160, would show, say $16,000 to be applied to the ten bonds of complainant. This would leave still due on complainant's bonds, say, $10,000. For this complainant would be entitled to judgment quod recuperet against defendant State. But the individual Second Mortgage holders could not recover. No judgment can be passed in their favor How then can they be held to be plaintiffs?

In Stuart v. Dunham, 115 U. S. p. 329, being a Creditors Bill to set aside fraudulent conveyances, and the jurisdiction being based upon diverse citizenship, it appeared that other creditors who were citizens of the same State with the Defendant were permitted to come in and prove their claim, thus, in substance, forcing the Court to permit a citizen of one State to enforce his claim in the Federal forum against a citizen of the same State. The Court said, in substance, that their introduction as complainants did not oust the jurisdiction, because the bill having been filed by the original complainants on behalf of themselves and other creditors choosing to come in and share in the expenses of litigation, the Court in exercising jurisdiction between the parties would *incidentally* decree in favor of all other creditors coming in under the bill, saying that such a proceeding was merely ancillary to the jurisdiction acquired as between the original parties, and it was merely matter of form whether the new parties came in as complainants or were allowed to prove their claim before a Master under a decree ordering a reference to prove the

claims of all persons entitled to the benefit of the fund; the Court further saying that if the latter course had been adopted no question of jurisdiction could have arisen, and that the adoption of the alternative course is the same thing.

IV.

ATTEMPT OF DEFENDANT STATE TO AVOID ITS RECOGNIZED OBLIGATIONS.

North Carolina after acknowledging these second mortgage bonds as a part of its recognized *ante bellum* debt, scheduling them for funding at twenty-five per cent. of their principal, (Compromise Debt Law of 1879. See Record 131, section 1 and 4 of the Act,) and discharging millions of them at this rate, (answer of N. C., section IX., Record 18,) seeks to vitiate them by alleging that State Treasurer did not obey the Act of 1855, which required him to advertise before issuing and directed that he should not sell for less than par. He did advertise as required. (Record 81 et seq.) He did sell for par. The State owed the Western Railroad Company for unpaid subscription to its stock. The Company said to the State: "We will give you par for the Bonds. You pay for your stock according to your contract." The transaction was precisely the same as if the Railroad Company had borrowed say one million cash from a bank, then handed the one million to the State for one million of bonds, then demanded of the State one million cash for payment of stock subscription and got it, and then handed the one million to the bank. (Deposition of Battle who was State Treasurer in 1867, when bonds were issued. Records '83, et seq.)

But the State Treasurer when he issued these bonds in 1867, was not required to advertise, nor was he prohibited from selling below par. (Act of 1867, Record 170.)

This Act, sec. 1, *required* him to issue the bonds for the stock upon certificate of Railroad President to Internal Improvement Board. Substance of this Act was that State should exchange bonds for stock, dollar for dollar.

Nor was there any reason why the State Treasurer should not have exchanged the State Bonds for the Railroad Stock as he did. In doing so he was complying with the Act of 1855 (Record 116) which made the State subscription to the stock of the Railroad Company. Counsel for the defendant State seemed to make the point (Record 91, bottom et seq.) that the spirit and intention of the Act of 1855 were that State Bonds *should* not issue unless the Railroad Company could realize par in *cash*, because the State, as the holder of two-thirds of the stock in the Railroad Company, was jointly concerned that the Company should get par for the Bonds, and so, says defendant State, the law was violated in the issuing of these Bonds and they are void. This point will not do for many reasons, some of which are these:

1. It is too late for the obligor to deny his Bond after recognizing it for thirty-five years by paying its coupons for a time and by scheduling it as a part of his recognized debt in his offer of compromise to his creditors. In deed the bonds sued on, dated in 1867, are part of the issue under the Act of 1855, so that the obligor has recognized the issue for forty-eight years.

2. Ten years after the first issue, (in 1866), he secured by mortgage such as had not been and so were thereafter to be issued, thus recognizing them and commending them to purchasers.

3. The Act of 1867 discarded such spirit and intent and abandoned such policy, if it ever existed, by expressly requiring the State Treasurer to issue the bonds (Record 170); and this Act was passed when, as this record shows, (Answer of North Carolina, Art. IX, Sec. 18), and as this Court knows, it being a matter of public history, the State was at the bottom of its bankruptcy and poverty, its debt out of all proportion to its property and its bonds below par.

But the Act of 1855 was obeyed. The direction was that the State Treasurer should not sell for less than par. He did sell for par. The Railroad Company did pay par. There is nothing in the Act of 1855 which can be tortured into an expression of a purpose to prohibit the sale of the bonds

to the Railroad Company at par unless the Company could get par for them on the market. In those days North Carolina paid her debts. She never thought to evade payment of that stock subscription, and, if her bonds had fallen below par on the market, she would gladly have given them to her creditors at par. She had not then descended to repudiation.

V.

MOTIVES OF ASSIGNORS—TITLE OF COMPLAINANT.

Where, as in the present case, the State does not assume the prosecution of the debt owing by the defendant State for the benefit of its citizens, but is itself the real, actual *bona fide* owner of the debt, acquired by virtue of the act of the Legislature of the plaintiff State by a donation from individuals, it makes no difference that the Court may surmise, or that the fact may be conceded to be that the motive of the individuals in making the donation to the plaintiff State was the bringing of suit by the plaintiff State in this Court against the defendant State.

It has been held in many cases that where conveyances are made for the purpose of vesting title in the plaintiff to enable him to bring suit, the Court, in deciding the question of jurisdiction, will not inquire into the motive for making the conveyance where the transaction is real and not colorable, and the plaintiff becomes the real, actual and beneficial owner of the claim sued on, as is the case here, under the act of the Legislature of South Dakota, 1901.

Marshall, C. J., McDonald vs. Smith, 1 Pet., 620.

Barney vs. Baltimore, 6 Wall., 280.

Smith vs. Kernochan, 7 How., 198.

Dickerman vs. Northern Trust Co., 176 U. S., 181.

In the Dickerman case it appeared that the mortgage securing the bonds provided that the bonds should be payable if

any execution should be sued out against the mortgagor company and not paid. A bond holder brought suit before a Justice upon six coupons and the mortgagor company consented to a judgment and the issue of the execution and on the same day the trustees under the mortgage gave notice that by reason of the execution being unpaid the principal and interest upon all the bonds should become due and immediately took possession of the property, and the Court held that while the proceedings were taken by connivance and consent of the parties they were not collusive in the legal sense and the debt was honestly due and the plaintiff entitled to judgment. It was also held that although the judgment was got for the obvious purpose of enabling the trustees under the mortgage to declare it to be due, the Court would not inquire into the motives of the parties. The Court said that it is well settled that while a mere colorable conveyance of property for the purpose of vesting title in a non-resident to enable him to bring suit in the Federal Court will not confer jurisdiction, the Court will not, in deciding upon the question of jurisdiction, inquire into the motive of making the conveyance, if the conveyance appears to be a real transaction.

And the Court said that if a person took up a *bona fide* residence in another State he might sue in the Federal Court, notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were a resident of the State in which the Court was held.

The Court further said that where a surety attacks a judgment against his principal, alleging that it was obtained for the purpose of defrauding him, the allegation will not stand unless it appears that no debt existed against the principal.

The Court also said that a person may buy stock in a corporation for the very purpose of bringing a stockholder's suit against the corporation, and that the law will not inquire into the motive which actuated his purpose.

The motives of complainants in conducting a suit cannot be inquired into because it is no defense to a legal demand

that the complainant is actuated by personal or improper motives.

Toler vs. East Tennessee Railroad, 67th Fed. 168.

VI.

TURPITUDE OF REPUDIATION.

The word repudiation was first coined in Mississippi about 1842, and became synonymous with dishonor among enlightened States the world over.

If an individual, able to pay his debts, purposely and continuously fails to do so, he is justly regarded as disreputable and, in this regard, a State stands on the same plane as an individual.

This Court stated in substance in the case of Louisiana v. Jumel, 107 U. S., 740, that when a State goes into the market as a borrower she lays aside her sovereignty and becomes responsible as an individual; and again in Murray v. Charleston, 96 U. S., 445, that a State which becomes a borrower, and contracts to pay the debt with interest, is not acting as a sovereign, but comes down to the level of ordinary individuals; and that, accordingly, there is no reservation of a sovereign right to withhold payment.

"Justice," said Burke, "is the great standing policy of all civilized States." No government worthy of the name will take advantage of any technical objections to avoid payment of a just debt.

Repudiation is simply the equivalent of confiscation. North Carolina claimed years ago to come within the category of an individual able to pay his debts and refusing to do so, and claimed to justify its non-payment on the plea of bankruptcy; alleging that she could not pay her debts in full, and that the stock in the North Carolina Railroad, which she had given to secure these Second Bonds, was without value, for the reason that the stock was not worth enough on the market to pay

the first mortgage; and accordingly she treated the Second Bonds just as if they were wholly unsecured.

The holders of the Second Mortgage Bonds now outstanding declined to take an offer of 25 cents on the principal with nothing on the coupons, which the State offered when she claimed to be insolvent; but now the stock given as security for the two sets of mortgage bonds is worth enough on the market to pay off, not only the first mortgage, but also the second mortgage, and leave $2,000,000 for the State.

And yet North Carolina retains the security, to pay the second mortgage bonds, and is guilty of the monstrous wrong of collecting every six months the income of the stock and turning it into its own treasury, without paying anything upon principal or interest of the second mortgage bonds, although that income so collected every six months, in equity and in common honesty is the property of the Complainant and the other second mortgage bond holders.

No language is too strong in which to denounce the turpitude of this proceeding.

Mr. Justice Custiss, in his article on the State debts already alluded to, (found in the volume of his memoirs, and first published in the North American Review in 1844,) declares that there is a remedy for such injustice and dishonesty in this Court, and that remedy is by placing a foreign sovereign or a State of the Union in a condition to bring suit against repudiating States in this Court; and the second mortgage bond holders might well have pursued that course in the present suit by requiring Complainant to agree to bring suit. This course would have been consistent with the ruling in New Hampshire vs. Louisiana, which only held that the plaintiff State could not recover when not the owner of the bonds sued on. But the second mortgage bond holders did not pursue this course. They assigned absolutely and unconditionally.

SUPPLEMENT.

Defendant State in the Depositions tried desperately to prove that the donation was made for the purpose of having a suit brought by a State. There is not in the Record a scintilla of evidence to show this purpose, unless the transaction itself is evidence of it as a sort of self-evident fact. But the transaction—that is, the act of donating—taken in connection with the evidence, does not show a purpose to have the suit brought. At most, it could only have been a hope in the breast of the donor, because the evidence is overwhelming and uncontradicted and conclusive that the donee State did not have any understanding or agreement as to bringing suit on the donated bonds. There is no evidence of any agreement, expressed or implied, that South Dakota would bring suit, while the negative is established beyond all question. (See Deposition of Mr. Burke who delivered the bonds to the Governor of South Dakota, Record 176 et seq. and ante; also Deposition of Governor Herroid, Record 32.)

ALFRED RUSSELL,
MARION BUTLER,
DANIEL L. RUSSELL,

Solicitors for Defendant, Charles Salter, representing Second Mortgage Bondholders.

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No. 8 ORIGINAL

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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1902.

IN EQUITY.

THE STATE OF SOUTH DAKOTA, *Complainant,*

vs.

THE STATE OF NORTH CAROLINA, CHARLES SALTER AND SIMON ROTHSCHILDS,
Defendants.

SUPPLEMENTAL BRIEF FOR THE STATE OF NORTH CAROLINA.

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JAMES E. SHEPHERD, *of Counsel.*

IN THE

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OCTOBER TERM, 1902.

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THE STATE OF SOUTH DAKOTA, *Complainant,*
against
THE STATE OF NORTH CAROLINA, CHAS. SALTER AND SIMON ROTHSCHILDS, *Defendants.*

SUPPLEMENTAL BRIEF FOR THE STATE OF NORTH CAROLINA.

I.

No controversy within the meaning of the Constitution is presented in this suit between the complainant and the defendant States, in which a decree can be made and enforced against the defendant State or its property.

In an elaborate review of the cases in which this Court has assumed original jurisdiction under the judicial clause of the Constitution, the opinion in Missouri v. Illinois (~~105~~ 180 U. S., 208), did not disclose any in which such jurisdiction had been entertained for the purpose of enforcing the public obligations of one State in a suit brought by another, much less where the complaining State was the voluntary assignee of parties who could not themselves sue. The cases referred to relate to the

settlement of boundaries between the States, and State action whereby public waters between the States are obstructed, polluted or diverted. It is true that reference is made in *U. S. v. Texas* (143 U. S., 621) to *U. S. v. North Carolina* (136 U. S., 211); but a glance at the opinion will show that that case was noticed in respect to *parties* only and for the purpose of establishing the proposition that the United States could sue a State for the establishment of the boundaries of one of its territories. It is hardly to be supposed that by such a reference and for such a purpose this Court, by way of *obitur dictum,* considered or undertook to pass upon a question of such grave import, and attended, as we conceive, with such tremendous consequences, as affecting the fundamental principles of the government as well as the peace and harmony of the States by whom it was created. The point in U. S. v. North Carolina (*supra*), which "did not escape the attention" of the learned Justice who wrote the opinion, was that:

> "The judgment would not have been rendered except upon the theory that this Court has original jurisdiction of a suit by the United States against a State."

It is clear that no consideration was given to the *subject matter* of the suit, nor could any question have possibly arisen affecting the jurisdiction, inasmuch as it was a *case agreed* and *voluntarily* submitted upon the single question as to whether the bonds bore interest. It was agreed that judgment as to this question should be entered according to the decision of the Court, and it was so entered and in favor of the State. That the Justice did not have this aspect in mind would seem clear from

another part of the opinion, where he quotes with approval from the opinion in Hans v. Louisiana (134 U. S.,1), the whole trend of which is against the contention of the complainant in this suit. And in still another part of the opinion, in tracing the origin of the jurisdiction, he speaks of the necessity of such jurisdiction "in cases of boundaries *and like controversies,*" etc.

We insist that expressions of the character mentioned in U. S. v. N. C. (*supra*), if indeed any more can be found in the reports, cannot be regarded as authority upon the question under discussion. That this Court considers it an open question would seem clear from the fact that in Missouri v. Illinois (*supra*), the Court, as we have seen, after its exhaustive review, fails to mention any case where such jurisdiction has been exercised, and declares that:

> "It would be objectionable and, indeed, impossible for the Court to anticipate by definition what controversies can and what can not be brought within the original jurisdiction of this Court."

One thing it does say, however, and plainly says, and it is that the language of the judicial clause—"controversies between two or more States"—while sufficiently comprehensive to include *all* cases where one State may choose to make complaint against another, *does not* so include them, and that the general language used in *Cohens v. Virginia* (6 Wheat., 266), giving countenance to such a proposition, has been under different states of facts "modified."

As an illustration of this, reference is made to New York

v. Louisiana (108 U. S., 76); Wisconsin v. Pelican Ins. Co. (127 U. S., 265, and Louisiana v. Texas (176 U. S., 1).

After referring to such a "supposition," the Court says:

> "But in this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look, not merely to the language but to its historical origin, and to those decisions of this Court in which its meaning and the scope of its operation have received deliberate consideration."

In Florida v. Georgia (58 U. S., 478) Mr. Justice Campbell, speaking of the purpose of the judicial clause, said:

> "It was not in the design of the Constitution to alter or even modify the existing relations of any of the sovereign parties named in this article, to legal jurisdictions, by enlarging their liableness to suit; but its purpose was to erect tribunals to which they might resort for the determination of the suits which they might legally commence, or might voluntarily submit, or were subject to according to pre-existing conditions."

Although this was a dissenting opinion, it evidently expresses the intention and understanding of the framers of the Constitution. A learned constitutional historian, (Thorpe), speaking of the utterances of Marshall and Hamilton, says:

> "From this contemporary exposition, considering its high source, it must be concluded that the framers of the Constitution did not intend to make it possible to drag a sovereign State before a Federal Court. Rather it appears from the arguments of Marshall and Hamilton, that the Constitution guaranteed every State against being made defendant in any action that might be brought."

While these views have not been adopted in respect to controversies as to boundaries and the like, they could not but have impressed the Court with a proper sense of the grave consequences that might result from an undue extension of jurisdiction; and hence it has been said that such jurisdiction should be "sparingly exercised." It is also said in Louisiana v. Texas (176 U. S., 15):

> "But it is apparent that the jurisdiction is of so delicate and grave a nature that it was not contemplated that it be exercised save when the necessity was absolute and the matter itself properly justiciable."

The leading opinions upon the subject sustain us, we think, in the proposition that the jurisdiction was only intended to provide for those controversies which arise originally and directly between the States as States. As said by Chief Justice Fuller in Missouri v. Illinois, (Justices Harlan and White concurring):

> "It must appear that the States are in direct antagonism as States."

"And again in La. v. Tex. (*supra*), the Chief Justice, speaking for the Court, said:

> "The States can not make war or enter into treaties, though they may, with the consent of the Congress, make compacts and agreements. When there is no agreement whose breach might create it, a controversy between the States does not arise unless the action complained of is State action. As might be expected, in view of the nature of the jurisdiction, the cases are few in which the aid of the Court has been sought in controversies between two or more States. They are cited in Wis. v. Pel. Ins. Co. (127 U. S., 265), and are chiefly controversies as to boundaries."

Differences as to boundaries and other like cases, growing out of and incident to the States in their sovereign and corporate character, are quite different from the "controversy" which is sought to be created by the voluntary action of the distant State of South Dakota, with whose boundaries or territorial rights we can never be in conflict, and with whom the defendant has never made any compact or agreement whatsoever. Its suit is based upon the proposition that one State can acquire from individuals, and without value, the public obligations of another State, and enforce their collection by the process of this Court against such other State or its property.

A judgment is prayed for against the State for the amount due and the sale by foreclosure of property owned by and in the actual possession of the State (the dividends from which constitute a considerable part of its necessary revenue), and the application of the proceeds to the entire mortgage indebtedness, all of which is held by individuals, except the ten bonds sued upon. In other words, such property, now in the possession of the State, and such revenue therefrom, is to be wrested from its possession and enjoyment, and its fiscal affairs and other internal regulations disturbed and to a great extent controlled by the judicial power of this Court.

We do not consider that we are over adventurous in saying that in the adoption of this brief, general and indefinite jurisdictional clause, the granting of such a power to the Federal judiciary was never for a moment contemplated, and that if the framers of the Constitution had considered that it conferred such a power, so utterly at variance with the fundamental prin-

ciples of the government they were constructing, the clause would have been instantly rejected. We say, furthermore, that, had it been understood that such a power would be claimed, who can doubt that the States, while permitting one State to sue another in certain cases, would have expressly excluded the power here claimed at the time of the adoption of the Eleventh Amendment? Mr. Justice Miller, in his lectures upon the Constitution (page 382), says, that:

> "The amendment just quoted was supposed to have settled the question of the suability of a State upon its obligations or for its debts in any other mode than that to which the State should give express consent, and that the Courts of the United States had no jurisdiction to entertain such suits."

And in Cunningham v. Macon (109 U. S., 446) he concluded a learned opinion by saying:

> "The absurdity of this proposition shows the impossibility of compelling a State to pay its debts by judicial process"—

an opinion, we may say, which has generally been understood and assented to from the very foundation of this government. The proposition to which we have referred, and upon which this suit is predicated, has never received the "deliberate consideration" of this Court. Indeed, we may safely assert that it has never been presented, and that this is the first time that the Court has been confronted with such a grave and momentous question. In its solution the Court will not, as it has declared, be governed by the mere literal comprehension of the judicial clause (Wis. v. Pelican Co., *supra*), but it will look into its

"historical origin," and upon that, as well as the whole Constitution and the character of the government established by it, determine whether judicial power has been conferred in respect to the case before it.

The controversies existing between the States were well known at the time of the adoption of the Constitution, and although a tribunal had existed under the articles of the Confederation for their determination, only eight cases were brought before it, and these involved solely questions of boundary "and the like." While the language of the Articles, establishing such tribunal, was even more comprehensive in its terms than the judicial clause of the Constitution, it was never suggested that it conferred jurisdiction to compel the payment of the public obligations of a State. It was thoroughly understood, and we may say, it is now so understood, that these rested entirely upon moral sanction and the good faith of the States.

This consensus of opinion does not, we most respectfully submit, rest upon the mere narrow technical ground as to who may be parties to suits, as it is well settled that a State may, in some cases, be sued by another State. *The question is one of far higher eminence, as it involves the inquiry whether the several States composing the Union granted to the judicial department of the Federal government such an extraordinary power as is claimed in the present case.*

There are certain general principles underlying this government which, we contend, forbids such a construction. We take it to be well established by the decisions of this Court that the respective States of the Union are supreme and sovereign except

as to those powers delegated to the government of the United States and those powers which by the Constitution they are prohibited from exercising.

In the great case of Texas v. White (7 Wall., 700), this Court said:

> "And we have already had occasion to remark at this term that the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, and that without the States in the Union, there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their Union under the Constitution, but it may not be unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

These brave, noble words, spoken at a time when the passions and prejudices engendered by the Civil War were still rife, demonstrated to the world that neither that war, nor those passions and prejudices could turn this great tribunal from a just conception of the character of the government established by our forefathers. It stood like a rock in the midst of an angry, turbulent sea, and the storm subsided before its calm, immovable attitude.

In Pennoyer v. Neff (95 U. S., 714), it is said:

> "But, except as restrained and limited by that instrument (the Constitution), they possess and exer-

cise the authority of independent States, and the principles of public law to which we have referred, apply to them."

In Lane v. Oregon (74 U. S., 71), the Court said:

"To them (the States) nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National government are reserved."

In Martin v. Hunter (1 Wheat., 325), Justice Story, speaking for the Court, said:

"It is perfectly clear that the sovereign power vested in the State governments by their respective Constitutions remain unaltered and unimpaired, except so far as they were granted to the government of the United States. (He refers to the words of the Tenth Amendment in confirmation.) The government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication."

In Buckner v. Findley (2 Peters, 586), the Court said through Justice Washington:

"In all other respects (that is, all other than National), the States are necessarily foreign to and independent of each other. Their Constitutions and form of government being, although republican, altogether different, as are their laws and constitutions."

See also Cooley, Constl. Lim., 29.

Mr. Hamilton said:

"The State governments would clearly retain all the rights of sovereignty which they before had, and which were not by that act (the Constitution) *exclusively* delegated to the United States." Federalist XXXII.

Mr. Madison said:

"The proposed government can not be deemed a National one, since its jurisdiction extends to certain enumerated objects and leaves to the several States a residuary and inviolable sovereignty over all other objects."

Federalist.

"The States," says Prof. Woodrow Wilson," are not administrative divisions but consistent members of the Union, co-ordinate with the Union in their powers, in no sense subject in their appropriate spheres. * * The States still carry by far the greater part of the weight of the governing function, still constitute the ordinary fountains of justice and of legal right, still stand nearest the people in the regulation of all their social and legal relationships.* * * They are the chief creators of law among us. They are the chief constituent units of our political system, not only, but are self-directing units." (The State, 469.)

It would seem idle to multiply authorities in support of the general principles above mentioned. From these, it appears that in all matters not delegated to the general government, the States are sovereign, and as said in Texas v. White (*supra*), "endowed with all the functions essential to separate and independent existence." This being so, it is proper to inquire into some of the attributes of this sovereignty and the nature of some of its essential functions. This, we think, is easily answered, so far as this case is concerned, by the statement of the generally recognized proposition, that a State has exclusive control of all matters of internal regulation, including the power of taxation, the administration of its fiscal affairs and the possession and management of its property and the revenues therefrom.

These are political powers of a State, and upon the States

devolve all the duties of the sovereign and of "separate and independent existence;" such as to provide for the protection, health, liberties and education of its people, the support of its charitable and other public institutions, and for the expenses necessary for its general government, and we may add, to its very existence as a political body.

In Mayor of N. Y. v. Miln (11 Peters, 102) the Court said:

> "But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these, where the power over the particular subject, or the manner of the exercise is not surrendered or restrained in the manner just stated." (See also License Cases, 5 How., 588.)

Considering then that a State, except as to powers granted to the Federal government, is sovereign and "endowed with all the functions essential to separate and independent existence," and that its "bounden and solemn duty" is to exercise such essential functions, it must follow, we think, that to it belongs the chief, if not the chiefest attribute of sovereignty, that is to say, its immunity from any judicial power as to the settlement of its public obligations. This is a principle of public and inter-

national law too well established, it would seem, to require the citation of authority. In U. S. v. Guthrie (17 How., 284), the Court said:

> "It would occur to every mind that a treasury not fenced around by fixed and established modes of administration, but which can be made subject to any number of demands, asserted and sustained, through the undefined and undefinable discretion of Courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation."

And these observations are equally applicable to suits against property, although there are liens upon it, as well as against the government directly. In Belknap v. Schild, 161 U. S., 10, the Court said: "As justly observed by the learned Judge who tried this case, there is no distinction between suits against the government directly and suits against its property. *The Siren*, 7 Wall., 152." (See also *Stanly v. Schwalby*, 147 U. S., 508.)

Were it otherwise, and the revenues and property of a State could at any time be controlled or taken from its possession by the process of a Court, *and in defiance of its legislative direction, as in the present instance*, it is obvious that its power to exercise "the functions essential to separate and independent existence" and to perform its paramount duties to its citizens, might be utterly destroyed.

Did our forefathers understand that they were granting such a power to the general government? Can it be conceived, in view of the jealous eyes with which they looked upon every grant of power, that they intended to concede one which would strip them of what may be confidently asserted is the chief and vital function of the sovereignty which they were so carefully

guarding, and reduce the States to the condition which counties sustain in relation to their several State governments? Can it be that such a grant was made or intended to be made in the six indefinite and still undefined words of the judicial clause of the Constitution—"to controversies between two or more States?" Undoubtedly they intended to confer jurisdiction in boundary and like cases as to which there had been and still existed differences between the States, and they could well have conceived of others respecting territory or diversion of public waters of a State and the like under the authority of State action. In other words, those differences that might directly arise between the States as States and as incident to their sovereignty. But as we have said, it is difficult to believe that this judicial clause was intended to grant a power which could destroy the functions "so essential to separate and independent existence," which this Court declared in Texas v. White (*supra*) remained with the States.

This provision of the Constitution must, as the Court has said, be interpreted in the light of the extraordinary conditions existing prior to, and at the time of its adoption, and the peculiar government to be established. The division of sovereignty by the concession of a part of it to a general government for the common welfare presented most serious and difficult problems, and occasioned at times very grave and obstinate differences of opinion, which, but for patriotic concessions on the part of the members of the Convention and of the various States, would have prevented the adoption of the Constitution. It was in this spirit that jurisdiction was given to this Court of controversies

between two or more States, the great purpose being to preserve the peaceful and harmonious working in the same sphere of action of two governments growing out of and founded upon such divided sovereignty. It was to *allay* controversies that might *necessarily* arise and not to encourage and authorize the creation of those founded upon no necessity or public policy and which would destroy the very peace and harmony which it was sought to maintain.

Surely no public policy can be subserved by assuming jurisdiction in the present suit and metamorphosizing these unenforcible obligations into the dignity of "controversies between two or more States" at the instance of the voluntary assignee of individuals. Where is the "absolute necessity" of so construing the Constitution as to make such demands justiciable and to enable States to become traffickers in the bonds of their sister States, and, as in this instance, *traffickers* in the supposed jurisdiction with Wall Street brokers? What a seemly spectacle does all this present, and to what inevitable evils must it lead; not the least among which is the opportunity afforded for fraud and fraudulent evasion of the Eleventh Amendment! What possible moral claim has the complainant? She gave nothing for these bonds, and it is plain that she is lending herself to the individual bondholders. She never informed the defendant of their acquisition by her and made no effort to "accommodate" the matter, the first the defendant ever having heard of the assignment being a newspaper report that she had moved for leave to file this bill. It evidently shows that the assignment was made for the purpose of a *suit*, and that no accommodation

would have answered the purpose of the assignors. And here it may be pertinent to quote the language of the Court in *Louisiana v. Texas* (*supra*): "It is difficult to conceive of a direct issue between two States where no effort at accommodation has been made." No reason can be given why any claim, liquidated or unliquidated, however small in amount, may not, by the assignment of the individual owner, become the subject of a "controversy between two or more States," or perhaps between a foreign country and a State. The language of the Constitution, ("between a State or the citizens thereof and foreign States, citizens or subjects"), would seem to authorize the latter proposition, if such claims could become the subject of a "controversy" within the meaning of the judicial clause.

As we have urged, the assumption of jurisdiction in this case involves necessarily a grant of power and such a grant as is wholly inconsistent with the possession of "all the functions essential to separate and independent existence" as a State.

That such a grant was never intended is not only, we think, apparent because of its inconsistency with the functions of independent government remaining in the States, but is manifest from the expressions of the fathers of the Constitution, and of distinguished statesmen, as well as jurists, both before and after its adoption.

In the Virginia Convention, John Marshall used some general expressions which go far beyond what is necessary for the defendant in this suit.

> "I hope (he said) that no gentleman will think that a State will be called to the bar of a Federal

Court. * * * it is not rational to suppose that the sovereign power should be dragged before a Court."

True, he was speaking in reference to the suits by citizens against a State, but the language is too general to be confined to such cases alone.

In discussing the judicial clause, Hamilton said:

"The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article on taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State government would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from constraint, but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign and have no pretentions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the Federal Courts, by a mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence would be altogether forced and unwarranted." Federalist.

Again, in his report in 1795, this same great authority says:

"Public debt can scarcely, in legal phrase, be defined either as property in possession or in action. It is evidently not the first 'till it is reduced to payment. To be the second would suppose a legal power to com-

> pel payment by suit. Does such a power exist? The true definition is, a property subsisting in the faith of the government. Its essence is promise. Its definite value depends upon the reliance that the promise will be definitely fulfilled."

This language is unmistakable and fully sustains us in saying that no such power was granted and cannot be implied from the judicial clause. Mr. Lincoln once said:

> "I do not mean to say that we are bound to follow implicitly in whatever our fathers did: to do so would be to discard all the lights of current experience—to reject all progress—all improvement. What I do say is that if we would supplant the opinions and policy of our fathers in any case, we should do so upon evidence so conclusive and arguments so clear that even the great authority, fairly considered and weighed, can not stand."

In Cohens v. Va. (6 Wheat., 266) this Court said:

> "Great weight has always been attached, and very rightly attached, to contemporaneous exposition. * * * The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our Constitution, and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank: and the part two of its authors performed in framing the Constitution, put it very much in their power to explain the views with which it was framed."

So far from any argument having been advanced to the contrary, the views of Hamilton and the fathers upon this subject have been generally accepted. Thus, no less a personage

than Daniel Webster said, in an opinion given to Barring Bros. (Works VI, 539):

> "It has been said that the State can not be sued on these (State) bonds. But neither could the United States be sued, nor, as I suppose, the crown of England in a like case. Nor would the power of suing give to the creditors, probably, any substantial additional security. The solemn obligations of a government, arising on its own acknowledged bond, would not be enhanced by a judgment rendered on such bond. If it either could not or would not make provision for paying the bond, it is not probable that it could or would make provision for satisfying the judgment."
>
> And in another part of the opinion he says "that the security for State loans is the plighted faith of the State, as a political community. It rests on the same basis as other contracts made with established governments, the same basis, for example, as loans made to the United States under the authority of Congress—the good faith of the government, making the loan and its ability to fulfill its engagements."

See, also the statement of Chief Justice Taney in 20 How., 530, cited in the general brief, in which he declares that the holders of such obligations must "rely altogether on the sense of justice and good faith of the State."

Even Edmund Randolph, in pleading for judgment in Chisholm v. Georgia, doubted the power of the Court to enforce the judgment.

> "What (he said) if the State is resolute to oppose the execution. This would be an awful question, indeed! He to whose lot it should fall to solve it would be impelled to invoke the god of wisdom to illuminate his decision."

This difficulty of judicial enforcement was still apprehended in New York v. Louisiana (*supra*), although nominally one State was suing another, as we find the complainant's counsel (the same as in this suit) saying in his brief (see Book 27, page 637, L. Ed.) that—

> "None of the difficulties as to execution of any decree passed herein that were apprehended in the early cases (*Chisholm v. Ga.*) can here exist. The decree will go against the individual defendants," meaning the Governor, Treasurer and others who were also parties. There are no such defendants here, but only the State, and it is against the State directly that any decree in this suit is to be enforced.

In Cronch v. Cr. Fonc., L. R., 8, 2 B., 384, Blackburn, J., says:

> "Foreign and colonial governments frequently create a public debt, the title to portions of which is made to depend on its possession of bonds expressed to be payable to bearer or holders. There can hardly be said, properly, to be any right of action on such instruments at all, though the holder has a claim on the government."

The French jurists say:

> "When the liquidation of a demand against the State is made for the creditor, payment is not thereby assured. The creditor can not coerce payment executively, as in the case of private debtors. If the minister asserts that he has no money, or that the appropriation is exhausted, the creditors must wait until the government supplies the requisite resources. It results that the creditor is at the mercy of the government for this payment. But we must not forget that the government represents the public probity, and that its high mission and weighty responsibilities afford

guaranties which seem to satisfy creditors as well as society itself."

Dalloz Jur. Gen. Verbo. Tresor. Pub., Nos. 383, 384.

Dufour, Droit, Adm't, 4, pages 629, 630.

3 Proudhon Dom. de Prop., No. 826.

"The nature of things opposes the opinion that the judicial tribunals should be competent to determine that the government is a debtor."

3 Proudhon Dom. de Prop., No. 826, pages 67-70.

"The history of our country shows that the government has habitually determined the claims to be adjusted; the medium of payment, and the persons to be paid, Confederations, Union and States have exercised their sovereign rights."

Hamilton's Report in 1792 and 1795.

2 Cong. Annals, page 1792.

3 Cong. Annals, page 1362.

2 Pitkin Civil Hist., 336-342.

3 Writings Gallatin, 121, 123, 143.

Extracts from brief of Judge Campbell in N. Y. v. New Hampshire.

Professor Ordronaux, in his work on Constitutional Legislation (283), says:

"The question of repudiation resides with the political department of the State, over which the judiciary can exercise no control."

The question before the Court, we contend, is practically decided by the principles declared in Hans v. Louisiana (*supra*).

The letter of the Constitution was appealed to in that case, as well as in this and in the case of Chisholm v. Georgia (*supra*). It was urged that it was a case "arising under the Constitution or laws of the United States," and therefore within the language of the Constitution authorizing a citizen to sue his own State. In denying the jurisdiction the Court said "It was an attempt to strain the Constitution and the law to a construction never imagined or dreamed of," and based its conclusion upon the dissenting opinion of Justice Iredell in Chisholm's case and the views of Hamilton and other statesmen and jurists, which we have quoted. After quoting from these, and especially the language of Mr. Hamilton in full, the Court said: "It seems to us that the views of those great advocates and defenders of the Constitution were most sensible and just, and they apply equally to the present case as to that (Chisholm's case), then under discussion." The Court also, in quoting the letter of Mr. Webster to Baring Bros. (*supra*), said: "Mr. Webster stated the law with precision in his letter to Baring Bros." Referring to Chisholm's case, the Court said:

> "It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the Federal Courts to entertain suits against a State brought by citizens of another State, or of a foreign State. Adhering to the mere letter, it might be so, and so, in fact, the Supreme Court held in *Chisholm v. Georgia;* but looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right, as the people of the United States, in their sovereign capacity, subsequently decided."

This, we submit, overrules the principle of the decision in Chisholm's case. How did Mr. Justice Iredell look at it? *The rationale* of his opinion is thus stated by the Court:

> "Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals (which he conclusively shows was never done before), but only, by proper legislation, to invest the Federal Courts with jurisdiction to hear and determine controversies and cases between the parties designated, that were properly susceptible to litigation in the Courts."

And further on the Court proceeds:

> "The truth is, the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such by the common law; such, for example, as controversies between the States as to boundary lines, and other questions admitting of judicial solution. * * * Of other controversies between a State and another State, or its citizens, which, upon settled principles of public law, are not subjects of judicial cognizance, this Court has often declined to take jurisdiction. See *Wisconsin v. Pelican Co.*, 127 U. S., 265."

Was not a suit by one State against another to enforce public obligations equally as "new" and as "unheard of" a remedy as the suit of an individual against a State? Was it not equally "unknown to the law and forbidden by the law"? Was it not contrary to "the principles of public law" and contrary to "history, experience and the established order of things"?

Would not the reserved sovereignty of the States, to regulate its fiscal and other internal affairs, and to control its own property, be invaded by a suit in the one case as well as in the other?

The answer is to be found in the words of Hamilton, Webster and other great men referred to in the opinion, to the effect that contracts of this character are only binding on the conscience of the sovereign, and that a State can not be deprived of its "pre-existing right" of determining and settling its debts by judicial or other constraint.

These views, as we have seen, have been stamped with the seal of approval by this Court in Hans v. Louisiana; indeed, they constitute the principles of decision in that important case.

It must, we think, be manifest that this very generally recognized proposition, that public obligations rest alone upon the good faith of the State, is founded upon the principle that their payment can not be judicially enforced; and that this immunity from such judicial coercion, which is also generally recognized, grows out of the inherent character of every political body endowed with and exercising "all the functions essential to independent and separate existence." Inasmuch as it is invested with such sovereign attributes and charged with their corresponding duties, it has necessarily complete control and direction of all of its property and revenues, and, in this country, such control is exercised by the *political department of the State alone.* Such control can not exist in the presence of judicial interference and coercion; and as such control is based upon the fundamental principles of this government, and so declared by this Court, and as there is no express

grant of such a conflicting judicial power, the conclusion would seem to be irresistable that its existence, as Hamilton said, can not be "implied" from a mere grant of "a limited and special jurisdiction" over admittedly undefined controversies. It is not at all surprising, therefore, that the Court said in Wisconsin v. Pelican (*supra*):

> "This Court has declined to take jurisdiction of suits between States to compel the performance of obligations, which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments."

Thus, in *Kentucky v. Denison* (24 How., 66), this Court, while holding that the case was a controversy between two States, decided that it had no authority to grant the writ. The Court further cited Cherokee Nation v. Ga. (5 Peters, 1), in which, after denying its jurisdiction as to one point, it said, through Marshall, C. J., that—

> "That part of the bill which respects the land occupied by the Indians, and prays the aid of the Court to protect their possessions, may be more doubtful. The mere question of right might, perhaps, be decided by this Court in a proper case with proper parties. But the Court is asked to do more than decide on the title. The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the Court may well be questioned. It savors too much of the exercise of political power to be within the province of the judicial department."

These cases clearly show that whatever may be the judicial power, it does not extend to, but is limited by, and subordinated to the political powers of a State.

In Wisconsin v. Pelican (*supra*), the Court further says:

> "The grant is of 'judicial power,' and was not intended to confer upon the Courts of the United States jurisdiction of a suit or prosecution by one State of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of other States at all."

The numerous authorities, as well as opinions of statesmen and jurists, which we have cited, would seem to be conclusive that the present case falls within the principles above stated. The distinction between obligations between individuals, and between a State and individuals, and the serious consequences of the judicial enforcement of the latter class by an invasion of the political and executive functions of a State, are pointed out in *Ex parte* Ayers, 123 U. S., 443, extracts from which appear in the general brief.

As is said in the general brief, in speaking of the judicial clause:

> "Was it not rather an extension of jurisdiction over parties previously not subject to judicial action, rather than an extension of judicial power over subject matters which were previously beyond the competency of the Courts to deal with?" And, as Mr. Hamilton said, "In destruction of a pre-existing right of the State governments."

In none of the cases where the distinction is drawn between individuals justifying under an unconstitutional law and the acts of agents or officers of a State, where the State is substan-

tially the party in interest, is there any decision that if, in the latter class, the State could have been made a party, affirmative relief could be granted in order to compel it to perform its public obligations. See review of cases in Pennoyer v. McConnaughty (140 U. S., 1).

On the contrary, as we have seen, the expressions of the Court have been entirely the other way; and in this connection we refer to the opinion of the Court in Christian v. Atlantic and N. C. R. R. (133 U. S., 233), in which it is laid down as one of the general principles applicable to suits against a State, *"that its property in the possession of its own officers and agents cannot be reached by its creditors by means of judicial process."* It is true that the State was not a party, and upon that principle, the juridiction could not be entertained, but even if it had been a party, the other principle we have quoted, and which we have endeavored to maintain in this discussion, absolutely forbids the judicial enforcement of the public obligations of a State. It was very natural that the Court should have mentioned this principle, as we have seen that it was founded upon the very nature and structure of the government, and involves the most essential function to the independent and separate existence of a political body.

The State of North Carolina is in the complete possession of the property which is sought to be subjected in the present suit. Its possession is like that of the State in Christian's case (*supra*). It owns a majority of the stock in the North Carolina Railroad Company, and absolutely controls the railroad through its proxies, and the physical possession thereof through its

agents or lessees. As was said in Christian's case, "No stockholder of any company ever had more perfect possession and ownership of his stock than the State of North Carolina to the stock in question." The object of this suit is the same as was explained in Christian's case—"to get possession of her property; to sequester her dividends (if any there be), and to compel the payment of them to the complainants; to seize and sell her stock in the railroad, stock of which she is in the sole possession."

This possession, as we have said, is in the political department of the State, and the dividends are a part of its public revenue in the hands of its Treasurer, who can administer it only under the direction of the Legislature.

The State of North Carolina, for reasons which appear to it to be just and proper, *has forbidden the Treasurer to satisfy the demands of the complainant and its allies in this suit.* It has forbidden that any of its property shall be so applied, and this it has done in the exercise of a discretion which is vested in it as a political body, "endowed with all the functions essential to separate and independent existence." For the reasons we have advanced, and the authorities cited, we insist that this discretion cannot be controlled or coerced by the judicial power of this or any other Court. If no power exists to enforce a decree, then the Court, we respectfully submit, should refuse to entertain the jurisdiction.

We are conscious that in this discussion we have referred to general principles of the government and opinions of "the fathers," publicists and statesmen with which this Court is entirely familiar. In doing this, however, we have but followed

the example of this august tribunal when it passes upon great questions of constitutional law; and it does this, we believe, because it is only by resorting to such sources of information—we may almost say of inspiration—that the character of this government, as designed and fashioned by its authors, can be rightly understood and preserved.

The proposition upon which this suit is based, is one, we respectfully submit, which challenges a review of the history and fundamental principles of the Constitution, and which affects not only the defendant State, but all of the States composing the Union.

II.

"The evident purpose of the amendment, so promptly prepared and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens," or, we may add, to the citizens of other States.

Such is the language of this Court in *New Hampshire v. Louisiana* (108 U. S., 76); and we contend that the pleadings and the testimony in this suit bring it within the principle thus declared. The creditors in the above mentioned suit attempted to evade the Eleventh Amendment by a more open and direct

course, that is, by assigning their claims to the complainant State, under statutory sanction, for the avowed purpose of collection for their own benefit. Seeing that this method would not avail them, the creditors in the present suit have concocted a scheme which, under the guise of a gift to the complainant State, is to accomplish the same result. In consideration of what may be justly called a fee, and a small one, too, (as it will very probably be diminished by counsel fees and other expenses, see Act of South Dakota, page 41), the creditors have, in effect, employed the complainant State to commence and prosecute this suit in order that all of the outstanding bonds of the class sued upon, and which are owned or controlled by Schafer Bros., may be drawn within the jurisdiction of this Court on the ground that the holders thereof are necessary parties to a decree of foreclosure. Although essentially plaintiffs in interest, and should be arranged as such (see general brief), they could not, under the judicial clause of the Constitution, be joined as complainants with the complaining State; and hence *they have procured themselves to be sued as co-defendants.* If, in pursuance of this arrangement, they can succeed in collecting their claims, they will succeed in doing precisely what is prohibited by the Eleventh Amendment. If we have established by the testimony that such was the purpose of the gift, and that this suit is instituted in order to carry out such purpose, then we respectfully submit that it is an attempted fraud upon the jurisdiction of this Court and an evasion of the Eleventh Amendment. It may be that counsel will argue that the complainant State has the legal title to the ten bonds sued upon, and that no

matter what were the purposes of the assignment, the assignors can not dispute such title, and therefore she can sue upon it. Granting all this to be true, for the purposes of the argument, so far as the assignors are concerned, it is equally true that she can not use, or allow to be used, such legal title as a part of a scheme to perpetrate a fraud upon the jurisdiction and to evade a great constitutional provision.

Even if, in the light of the testimony, it were possible to conceive that, in accepting these bonds, she was innocent of any knowledge or suspicion of the fraudulent purpose, it would be immaterial, as she is the immediate assignee of parties having such fraudulent purpose, and, being a volunteer, is affected therewith. Acquiring the title in this way she can not be permitted to become even a mere passive instrumentality in the violation of the amendment.

In discussing the testimony we desire to direct the attention of the Court to the fact that about the first of March, 1901 (page 89), the Schafer Bros., brokers in New York, presented a memorial to the General Assembly of North Carolina, asking for the settlement of these second class "mortgage" bonds; and that from the said memorial it appears (page 151) that they owned and controlled two hundred and forty-two of the same, they owning a large majority in their own right and the remainder as "trustee" for others. These were about all of that class of bonds outstanding, the other holders having long since funded their bonds under the Act of 1879 (page 129). It also appears from the testimony that not only before the presentation of the said memorial, but ever since, the Schafer Bros. con-

tinued to own and control all of these bonds, and that Simon Rothschilds, who is made a defendant as a representative of the class of first mortgage bondholders, and who also owns sixteen of the second "mortgage" bonds, has surrendered complete control of any part he was to play in this suit to Schafer Bros. He says that his bonds have been in their hands for collection for ten years; that he has never agreed to pay counsel fees in this suit; that he "left all that in Schafer's action" (page 56); that he does not recollect that he ever read the bill of complaint, and that all he did when he was served with process was to see Simon Schafer (page 57); that he consulted no counsel, and that Schafer is to attend to his interest in these and other bonds (page 58.) To the same effect is the testimony of Charles Salter, who is made a defendant as a representative of the second "mortgage" bonds and who filed an answer in this suit. He says, "This matter I put with Schafer Bros. some years ago and left it to them," "entirely with them" (p. 61); that Gov. Russell, he presumes, prepared the answer; that Schafer Bros. suggested his employment; that he has paid no fees, that Governor Russell was not employed directly by him, "but by the Schafers," whose attorney he was. That the Schafers employed counsel and *"they are managing this whole business."* (Pages 62, 63.)

Thus it appears that Schafer Bros. entirely control the other two defendants in this suit, and also all that has been done in the inception and furtherance of this attempted traffic in jurisdiction has been done at their instance and under their direction. Their acts and statements, and the acts and statements of their counsel, therefore, are binding upon those two defend-

ants. At the time the memorial was presented, it appears that Mr. Ricaud, of New York, Mr. Busbee and Senator Butler, of North Carolina, were counsel for Schafer Bros. in respect to the collection of these bonds, though the memorial was signed only by Mr. Busbee, Senator Butler having been employed in January, 1901 (page 181), and Mr. Ricaud sometime in 1900 (page 103.) The memorial having failed, nothing more was heard about these bonds until sometime in October, 1901, when application for leave to file this bill was made by the State of South Dakota. This is the first time any one in North Carolina, except complainant's counsel, ever heard that the complainant had acquired these bonds. Governor Aycock (page 93) says that his first information came from the newspaper reports of the said application and that no demand, or attempt to negotiate was made. Indeed, the Governor of South Dakota tells us that he gave no notice of the assignment and that he made no demand or attempt to negotiate, but simply turned the bonds over to the legal department for collection. (Page 37.) Whether such conduct "comports with the dignity and gravity" and the comity that should characterize the States of this Union in dealing with each other depends, we suppose, upon how far the "spirit of commercialism" has progressed in this country. It is all the more remarkable, too, when it is considered that this is the first instance we have in the history of this country, either before or after the adoption of the Constitution, of one State acquiring the public obligations of another State and attempting to enforce them for its own alleged benefit by the process of this or any other tribunal.

The explanation of this breach of comity, as abundantly appears from the testimony, is, that it was not intended to give the defendant an opportunity to negotiate, or to come to an "accommodation." What the assignors wanted was *a suit*, and the assignee shows by its extraordinary conduct, that it *was willing to bring it for them.*

The bill, when read with the answer of Chas. Salter, would seem alone sufficient to indicate the purpose of the assignment and the object of the suit. When, however, the testimony is considered in connection with these pleadings, we think that all doubt must disappear. In the first place, what an unusual thing it is that such a gift should be made at all; and especially by brokers living in New York, and to such a distant State as South Dakota! Simon Schafer had no "financial interest" in that State. "He was born and reared in New York City;" nor was he "particularly interested" in South Dakota, nor had he any "children out there," nor was "he interested in the schooling of any children there" (testimony of Samuel Schafer, page 73). So strange did it seem to this witness that he tells us that when he heard of the gift he was "angry" with his brother, that is, (he explains), he did not approve of it. He became reconciled, however, when his brother told him that he *"thought it would ultimately inure to his benefit, some of his bonds."* The witness also stated that Simon Schafer gave his own bonds, but that they both owned jointly about $140,000 of the same kind. (Page 74.) We have here an express declaration of the purpose of the gift. How could the gift possibly "inure" to the benefit of their bonds unless a suit of this kind was to be instituted? Now,

where did Simon Schafer get this idea? He is dead, and we therefore, had no opportunity of examining him. But enough appears to show that it was the result of legal advice. Although Governor Russell, on his examination, declined to answer questions bearing on the purpose of the assignment, on the ground of professional privilege, his testimony shows that Mr. Busbee and Mr. Ricaud were talking of the rights of sovereigns to bring suits, etc. (page 105). The witness was asked:

> "Did you have any information from any source whatever, from any parties whatever, prior to the time you were employed as counsel for any of the holders of the second mortgage bonds, that it was in contemplation by any parties or persons whatever to so place a portion of the said mortgage bonds as to enable some State to bring action, or a suit in the Supreme Court of the United States, against the State of North Carolina to recover the said second mortgage bonds?" *Answer*: "Oh, I might have heard some such talk; the matter was discussed. I remember having some talk with Mr. Busbee about it. Well, I guess that was in March, too, or April, 1901." *Question:* "Do you know at whose suggestion a bill was introduced in the Legislature of South Dakota in 1901, to enable that State to accept or receive a gift of any of the second mortgage bonds, or of any bonds, and what the purpose of that bill was?" *Answer:* "Oh, I think I heard Colonel Stewart, of South Dakota, and possibly Mr. Burke, say that they had the bill introduced, or that one of them introduced it, or something of that sort." *Question:* "I will ask you if you did not at that time learn that the chief purpose of that act was with a view to receive from the Schafers a donation of the bonds now in suit, and with a view of bringing a suit against North Carolina to recover?" *Answer:* "Oh, it is not improbable that

such an inference was made; it may be that such conclusion was inferential from what they said." *Question:* "Do you know, Governor, that the bill was going to be introduced in the Legislature of South Dakota before it was done?" *Answer:* "I think I did hear it mentioned." *Question:* "Did you know that Simon Schafer was going to donate ten bonds to the State under that bill? *Answer:* "Did I? No, sir; I did not know he was going to do it, and, indeed, I am quite sure, or I have reason to believe at least, that he was not willing to do it until about March, 1901." *Question:* "Well, did you know why Simon Schafer was not willing to do it before that date?" *Answer:* "Well, yes. I knew, I know what he said, but I shall not state what he said for reasons already given." (Page 108.)

The witness also had a conversation with Senator Butler about a suit to recover these bonds, and it appears in evidence that Senator Butler suggested to Senator Pettigrew to have the Act passed, and that Mr. Burke had it done through Colonel Stewart (page 180). It was passed March 11, 1901. This witness further testified that it may have been, though he hardly thinks so, that Mr. Wheeler H. Peckham (who, now appears of record for the State of South Dakota), was employed or consulted at the suggestion of Mr. Ricaud, the attorney of the Schafers. The witness, continuing, said:

"I will further state, since thinking a little further about one of your former questions, that my impression is that Mr. Peckham was employed or consulted with regard to these second mortgage bonds sometime in March, 1901." (Page 104.)

Now, why was Mr. Peckham employed or consulted about this matter in March, 1901, and who was it that consulted him?

It could not have been the State of South Dakota, as she did not acquire the bonds until the following September. It could have been none other than the Schafers, through their attorney; and this is not only manifest from all the circumstances of the case, but from the testimony, upon further consideration, of Governor Russell. Why, we again ask, this consultation with Mr. Peckham, the distinguished counsel who appeared in *New Hampshire v. Louisiana* (108 U. S., 76), and who had presumably sounded all the "depths and shoals" of "the original jurisdiction"? Why all this solicitude on the part of Schafer Bros. and their attorneys? Why all this talk about the passing of an act *with a view of a suit being brought* against the State of North Carolina? Why all this very careful preparation, if Simon Schafer, in the goodness of his heart, simply wished to give ten of his bonds to South Dakota? Donors do not generally put themselves to all this trouble and expense if no more than a mere gift is intended. They would naturally leave all matters concerning the simple acceptance of the intended gift to the donee. How is it possible to account for all this except upon the theory that the gift was made for the purpose we have charged?

Not the least remarkable feature of this suit is the means by which South Dakota was reached and made a party to this transaction. Some State must be found to institute a suit, and how convenient was it for Senator Butler to find it through his friend, Senator Pettigrew, of South Dakota. In 1900, Senator Butler visited South Dakota to assist his friend in his campaign for re-election. (Page 180.) He says he became interested in the condition of the University and other State institutions,

and afterwards, in January or February, 1901, he told Senator Pettigrew that he thought he "knew where he could get a donation," and the passage of the Act was again suggested, it having been talked about previously by them. At that time, he says, he did not state whether the donation would "be bonds or what kind of bonds." He then voluntarily proceeds as follows:

> "If I at a later period did discuss North Carolina bonds, and led him to believe that I could be instrumental in securing a donation of North Carolina State bonds, I would decline to give the information, because I could only have had such information from a consultation and a transaction between attorney and client, which, I understand, is privileged."

He says the client was Schafer Bros, and that he was employed by them in January, 1901. (Page 181.) Can there be a doubt as to this matter having been arranged by Senator Butler through his friend, Senator Pettigrew, while he was in the employment of the Schafers? Whether Senator Butler was more interested in the State institutions of South Dakota than in his clients, Schafer Bros., is a matter we leave without comment. Another remarkable thing in this transaction is the letter of Simon Schafer accompanying the gift. (Page 39.) The letter is as follows:

> "OFFICE OF SCHAFER BROS., No. 35 WALL ST.,
> "NEW YORK, *September* 10, 1901.
> "P. O. Box 2217.
> "*Hon. Charles H. Burke.*
> "DEAR SIR:—The undersigned, one of the members of the firm of Schafer Bros., has decided, after consultation with the other holders of the second mortgage

bonds issued by the State of North Carolina, to donate ten of these bonds to the State of South Dakota.

"The holders of these bonds have waited for some thirty years in the hope that the State of North Carolina would realize the justice of their claims for the payment of these bonds.

"The bonds are all now about due, beside, of course, the coupons, which amount to some one hundred and seventy per cent of the face of the bond.

"The holders of these bonds have been advised that they can not maintain a suit against the State of North Carolina on these bonds, but that such a suit can be maintained by a foreign State or by one of the United States.

"The owners of these bonds are mostly, if not entirely, persons who liberally give charity to the needy, the deserving and the unfortunate.

"These bonds can be used to great advantage by States or foreign governments; and the majority owners would prefer to use them in this way rather than take the trifle which is offered by the debtor.

"If your State should succeed in collecting these bonds, it would be the inclination of the owners of a majority of the total issue now outstanding to make additional donations to such governments as may be able to collect from the repudiating State, rather than accept the small pittance offered in settlement.

"The donors of these ten bonds would be pleased if the Legislature of South Dakota should apply the proceeds of these bonds to the State University, or to some of its asylums or other charities.

"Very respectfully,

"Signed) SIMON SCHAFER."

This letter, we submit, affords conclusive evidence of the purpose of the assignment. If Simon Schafer was giving his individual bonds, what possible reason did he have for consulting with the other bondholders of the same class? The letter

also shows that the bonds were given solely because "the holders" had been advised that they could not, but that a foreign State, or one of the United States, could maintain a suit against North Carolina.

In view of this letter and all of the circumstances in evidence, it is folly, it seems to us, to say that the State of South Dakota acquired these bonds in "due course," and that it can avail itself of all of the incidents attaching to commercial paper in the hands of a *bona fide* holder. States are not supposed to deal in such paper, as they are political bodies, and concerned only with matters of government incident to their sovereignty.

Mr. Carmen F. Randolph, in an able article (Notes "On Suits Between States," Columbia Law Review, vol. 2, No. 5, May, 1902), says:

> "Where the relation of borrower and lender exists between independent sovereigns, it is usually induced by political motives, such as strengthening an ally, or fastening a mortgage upon coveted territory: rarely does a government deal in the obligations of another merely for investment or speculation. Now, for such a relation between the States of the Union political motives are out of the question, and usually financial motives would seem to be quite as questionable as in the case of independent sovereigns."

After observing that a State is not forbidden to acquire another's bonds in due course, and may sue upon them, (although, in another place, he doubts whether their payment may be judicially enforced), he proceeds:

"But the speculative acquisition of obligations not enforceable by the persons who transfer them is not, in my opinion, 'due course'; it is not a transaction entitled to consideration at the hands of the Supreme Court."

He continues:

"But when a claim is acquired by a government only because a private claimant cannot secure its payment, a suit for its recovery should be dismissed as an attempt to evade the Eleventh Amendment."

And again:

"I can perceive no equity in a transfer of money from one State to another without real consideration, and were this (speaking of this suit) a possible transaction, private bondholders would exact substantial percentages of their bonds by threatening to throw them to States who would collect the full amount. Thus the States would be coerced contrary to the spirit of the Eleventh Amendment."

These views, sustained as they are by principle and reason, are especially applicable to this transaction.

That part of the letter which speaks of the holders of the bonds as "persons who liberally give charity to the needy, the deserving and unfortunate," will appear somewhat fantastic when considered in the light of the answer, drawn at the instance of Schafer Bros., in which, after admitting all the allegations of the bill and asserting that he and the other holders are entitled to be paid out of the proceeds of the foreclosure, *benevolently* concludes by praying that the bill be *dismissed*

"unless the Court shall decree that *all* the stock subject to the second mortgage be sold for the benefit of *all* the holders of said second mortgage bonds." (Page 28.)

Alas! what is to become of "the needy, the deserving and the unfortunate" if the Schafers and the other holders are not permitted to recover? And how, after this exhibition of generosity, can other States and *"foreign governments"* hope to realize much from the "inclination" of the holders to make "additional donations"?

Another fact to which we ask the attention of the Court appears in the testimony of the Governor of South Dakota. (Page 36.)He says that the bonds were delivered with the letter of Schafer by Mr. Burke on or about September 21, 1901, but that before that time, in an interview between him and Burke and Attorney-General Pyle, (who is dead), he heard that there was "a certain party who owned and held certain bonds issued by the State of North Carolina that he desired to donate to the State of South Dakota."

He was asked:

> *Question.* "Was any reference made during that interview with Mr. Burke—that is, the interview several weeks prior to the delivery of the bonds—in reference to the employment of counsel and the bringing of suit; and if so, what was it?"
>
> *Answer.* "I don't remember, but I think he said that he would or had talked the matter over with the Attorney-General."
>
> *Question.* "Then at the time of the delivery of these bonds you say that Colonel Stewart was the associate of the Attorney-General in regard to their collection?"
>
> *Answer.* "At that time I understood that it might be necessary to bring an action, and that Colonel Stewart had been associated with the Attorney-General in the matter."

Question. "Had Colonel Stewart been spoken to or employed by you at that time"?

Answer. "No, sir."

The Governor says he left the bonds in the office of the Attorney-General and never gave any notice to North Carolina. So it appears that several weeks prior to the delivery of the bonds private counsel had been employed to assist the Attorney-General in bringing a suit, and that he was not employed by the Governor. At whose instance, it may well be asked, was the counsel employed? This sustains us in saying that the bonds were given for the purpose of a suit. Is it not perfectly safe to conclude that they would not have been given had there been an understanding to the contrary? It is true that Mr. Burke, on his examination, stated (page 177) that he delivered the bonds without any conditions except a suggestion that the assignor hoped that the proceeds might go in aid of the State University, and the witness also stated that he knew of no reason why the State could not accept twenty-five cents on the dollar. This was objected to by the defendant State, because it was clearly a mere matter of *opinion,* the witness having already stated with great particularity *all the facts within his knowledge.* (Page 174.)

He says:

> "I never conversed with any person connected with this transaction, representing the State of North Carolina, Schafer Bros., or any bondholders, or any one else connected with or owning these bonds, prior to the commencement of this action, except as I have stated."

The exceptions are Senator Pettigrew and Colonel Stewart. Senator Pettigrew seems to have been the connecting link, either directly or through Senator Butler, with the Schafers. Senator Pettigrew never said anything to Mr. Burke about the gift being unconditional, or that the State could accept 25 cents on the dollar; nor did Colonel Stewart say so. On the contrary, Senator Pettigrew said a suit might be necessary (page 176), and Colonel Stewart's conversation related only to the act of the Legislature. The evidence objected to then is nothing but an *opinion*, and purely of a negative character. It appears that Mr. Burke was to know no more about the transaction than was necessary to perfect the transfer of the bonds and put the legal machinery in motion. All, it seems, that he knew, according to his testimony, was contained in the letter of Simon Schafer. Can it be that his *opinion* merely is to have the effect of destroying the force of the powerful array of *facts* and *circumstances* in evidence, all leading irresistibly to the conclusion that the purpose of the assignment was to evade the Eleventh Amendment of the Constitution.

Another significant fact is that these bonds were, after all, not sent to Mr. Burke by Schafer Bros., but were delivered to him by Colonel Stewart (page 173), who had already been employed to assist the Attorney-General, and who, according to the testimony of Governor Russell (page 108), had told him that he had had the act introduced in the Legislature of South Dakota.

We earnestly contend that a perusal of the testimony will abundantly show that these bonds were assigned in pursuance of a carefully prepared scheme to evade the Eleventh Amendment of the Constitution of the United States.

III.

It seems to have been supposed by Senator Butler, who at that time was the attorney for Schafer Bros., that in order to carry out this traffic in jurisdiction, it was necessary that the Legislature of South Dakota should pass a law requiring the Governor of that State to accept donations, etc. The act is as follows:

"An act to require the acceptance and collection of grants, devises, bequests, donations, and assignments to the State of South Dakota.

"*Be it Enacted by the Legislature of South Dakota:*

"SECTION 1. That whenever any grant, devise, bequest, donation, or gift or assignment of money, bonds or choses in action, or of any property, real or personal, shall be made to this State, the Governor is hereby directed to receive and accept the same, so that the right and title to the same shall pass to this State; and all such bonds, notes or choses in action, or the proceeds thereof, when collected, and all other property or thing of value, so received by the State as aforesaid, shall be reported by the Governor to the Legislature, to the end that the same may be covered into the public treasury or appropriated to the State University or the public schools, or to State charities, as may hereafter be directed by law.

"SEC. 2. Whenever it shall be necessary to protect or assert the right or title of the State to any property so received or derived as aforesaid, or to collect or to reduce into possession any bond, note, bill or chose in action, the Attorney-General is directed to take the necessary and proper proceedings and to bring suit in the name of the State in any Court of competent jurisdiction, State or Federal, and to prosecute all such suits, and is authorized to employ counsel to be asso-

ciated with him in such suits or actions, who, with him, shall fully represent the State, and shall be entitled to reasonable compensation out of the recoveries and collections in such suits and actions.

"Approved March 11, 1901."

Whether this act was passed for the purpose of compelling the Governor of South Dakota to accept these bonds, and thus relieve him of the odium of being voluntarily connected with a transaction of this character, or whether it was intended to compel him to bring suit, or whether it was supposed that *the Governor alone could not, by any act of his,* create "a controversy between two or more States," it is not for us to say. We suppose, however, that it was apprehended that the State, through its legislative department, must authorize such a transaction in order to create a "controversy between States." If such was the purpose, we contend that the efforts of these gentlemen, Senators Butler and Pettigrew and the Schafers and others, signally failed, as the act simply applies to ordinary bonds and other choses in action. If legislative sanction were necessary to create a controversy between States, it should have been *specifically* given. The Legislature could not give a general power of attorney to the Governor to create by any acts of his controversies of this high character.

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